Supreme Court, U.S.
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NO.

IN THE

Supreme Court of the United States

TAMARA WATSON,

Petitioner,

v.

LITHONIA LIGHTING, D/B/A HI-TEK GROUP, A WHOLLY OWNED SUBSIDIARY OF NATIONAL SERVICE INDUSTRIES, INC., AND NATIONAL SERVICE INDUSTRIES, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the court of appeals erred in affirming summary judgment against plaintiff on her claims under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*, on grounds that, as a matter of law, she was not "qualified" for a position in a multi-line manufacturing facility because occasional, *ad hoc* "rotation" to any of the jobs within the facility (including some that plaintiff was unable to perform because of her disability) was an "essential function" of the position.

LIST OF PARTIES

All of the parties to the proceeding in the court below are listed in the caption.

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Petitioner Tamara Watson respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (App., *infra*, 1a-5a) is reported at *Watson v. Lithonia Lighting*, 304 F.3d 749 (7th Cir. 2002). The opinion of the district court (App., *infra*, 6a-18a) was not designated for inclusion in the official reports, but can be found at *Watson v. Lithonia Lighting*, No. IP 00-1744-C-M/S, 2002 WL 393076 (S.D. Ind. Jan. 14, 2002).

JURISDICTION

The judgment of the court of appeals was entered on September 20, 2002, and this petition is being filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

The text of the relevant provisions of the ADA is set forth at App., *infra*, 19a.

The text of 29 C.F.R. 1630.2(n) is set forth at App., *infra*, 20a-21a.

STATEMENT OF THE CASE

A. Introduction

This case arises under Title I of the ADA, which prohibits discrimination against "a qualified individual with a disability because of the disability[.]" 42 U.S.C. § 12112(a). An individual is "qualified" for a job if he or she can perform the "essential functions" of that job, either

with or without accommodation. 42 U.S.C § 12111(8). Accordingly, whether an individual is "qualified" – and thus afforded the protections of the ADA – hinges upon the threshold question of what constitute the "essential functions" of the position the individual holds or desires. How a court is to determine the "essential functions" of a job is an important, recurring and perplexing issue under the ADA, but has not yet been addressed by this Court.

In the district court, defendant moved for summary judgment. Defendant argued that, subsequent to plaintiff's disabling injuries (which rendered plaintiff unable to engage in repetitive motion with her right arm), plaintiff was no longer "qualified" for the job she had held at defendant's manufacturing facility, and thus that defendant's termination of her employment could not have violated the prohibitions of the ADA.

Defendant did not dispute that, even with her disability, plaintiff was fully able to perform the tasks required on *certain* of its assembly lines. Indeed, defendant's own occupational therapist had so concluded, and for more than a year defendant had permitted plaintiff to work on those lines. Nonetheless, defendant eventually terminated plaintiff's employment. Once litigation commenced, defendant took the position that an "essential function" of plaintiff's former job was the ability to "rotate" to *any* of the stations on *any* of the assembly lines in the factory. Defendant's position was not supported by any job description or other evidence that pre-dated plaintiff's injury. Rather, defendant relied solely upon a purported "job description" that was created *after* plaintiff's injury, and an affidavit of its human resources director that was created solely for purposes of the lawsuit.

In response to defendant's summary judgment motion, plaintiff disputed that "rotation" from line to line was an "essential function" of her former job. She presented her

own sworn affidavit in which she stated that, upon her hiring, she had been permanently assigned to a single assembly line, and had been asked only occasionally to work other lines. In addition, in her affidavit, she specifically identified, by name, two other employees at the facility who, to her personal knowledge, had been permitted to retain their jobs despite physical restrictions similar to hers. Both of these facts tended to show that "rotation" was not truly important to the way defendant ran the facility: it occurred sporadically, and defendant permitted others to avoid line-to-line rotation entirely.

Thus, at the summary judgment stage, the issue appeared to present dueling affidavits, one from the defendant, and one from the plaintiff, which gave differing characterizations of the role of "rotation" at the facility. Despite this apparent evidentiary conflict, the court of appeals upheld summary judgment. It did so by applying what amounted to a *per se* rule that any employer who adopts a "rotation" requirement (*i.e.*, a requirement that its employees be able to move from position to position upon demand) is free to define the "essential functions" of the job as being *all of the functions of all of the discrete jobs* within that employer's facility, and thus may fire (or refuse to hire) anyone who, as a result of disability, is unable to perform *any* of those discrete jobs. And it applied this rule "as a matter of law" on a record that contained conflicting evidence on the issue of whether this particular employer even had a strict "rotation" requirement, thereby giving conclusive deference to the employer's own, disputed after-the-fact characterization of the functioning of its facility.

The implications of the court of appeals' decision are breathtaking. That decision, if allowed to stand, will create a loophole so large that almost any employer in a manufacturing or manual labor industry will be able to completely insulate itself from the requirements of the ADA.

An employer need only contend that it reserves the right to "rotate" its employees from task to task, and claim this "rotation" requirement as an "essential" element of its workplace, and it would be permitted to deny employment to an individual with a disability if that disability prevented that individual from performing even a *single one* of the tasks to which he or she might *theoretically* be rotated. For individuals such as the plaintiff in this case – whose disability prevents her from performing some, but not all, of the tasks typical to manufacturing jobs – the decision of the court of appeals, if permitted to stand, would present an insurmountable obstacle to her ability to obtain employment in any large-scale manufacturing setting.

Under the reasoning of the court of appeals, a man confined to a wheelchair would have no ADA protection if *any* of the discrete tasks within the factory required standing, even if he was fully able to perform each of the other tasks perfectly well from a sitting position. And a deaf woman would have no ADA protection if *any* of the jobs in the factory required her to hear, even if the majority of tasks in the factory could be accomplished competently in complete silence.

Not surprisingly, the decision in this case conflicts in various ways with the decisions of other courts of appeals, as well as with the interpretive regulations of the Equal Employment Opportunity Commission ("EEOC"), the expert agency charged with enforcement of the employment provisions of the ADA. Contrary to the decision in this case, other courts and the EEOC have recognized that an employer's own "say so" is not conclusive on the issue of "essential functions." Rather, those courts and the EEOC have adopted a multi-factor approach intended to delve past an employer's own characterizations to determine whether particular functions are *truly* essential. Such an approach is, of course, necessary to avoid precisely the type of giant

loophole endorsed by the court of appeals in this case. This Court should grant this petition to harmonize the law in this area, to close this loophole, and to preserve the core employment protections of the ADA.

B. Proceedings In The District Court

Plaintiff brought an action under the ADA in Indiana state court. Defendant removed the action to the United States District Court for the Southern District of Indiana, which had federal-question jurisdiction over plaintiff's claims pursuant to 28 U.S.C. § 1331.

As relevant to the question presented, the record before the district court evidenced the following facts. Defendant operates a manufacturing facility for the fabrication of lighting fixtures. That facility contains numerous different assembly lines (generally referred to as "lines") that assemble different products. Each line, in turn, contains various "stations." Each station is assigned a particular task necessary to the fabrication of the product created by that line. *See* App., *infra*, 6a-7a.

Plaintiff was hired to work at defendant's facility in July of 1997. Her job title was Manufacturing Operator ("MO"), the designation given to all employees who worked labor jobs at the facility. *Id.* at 7a. Plaintiff swore in an affidavit that she "was assigned permanently to Line 7 and would only occasionally be transferred to other departments or lines to meet production needs." *Id.* at 22a. This fact was disputed by defendant, which submitted an affidavit of its human resources manager, Charlotte Shaw, asserting that "[a]s an MO, Plaintiff was not permanently assigned to any one station on an assembly line, or even one specific assembly line, but rather from day to day was assigned to various lines throughout the plant, and from station to station on any given assembly line, as production requirements

dictated." *Id.* at 27a. Defendant submitted no contemporaneous documentation of how plaintiff was "assigned" when she first came to work at the facility.

In May of 1998, approximately 10 months after plaintiff began working at defendant's facility, she suffered an injury to her right shoulder. *Id.* at 7a. Following that injury, and through October of 1998, doctors placed plaintiff on temporary physical restrictions, including a restriction on repetitive motion of her upper right extremity. During that period of time, defendant (by its own admission) assigned plaintiff to stations on five specific lines that met her physical restrictions, and did not require her to "rotate" to other lines. *Id.* Defendant presented no evidence that its inability to "rotate" plaintiff to other lines within the facility during that period of time caused any production difficulties, imposed any additional costs, or had any negative consequences for other employees.

In October of 1998, plaintiff's doctor lifted all restrictions. But plaintiff's condition again worsened over time. On or about June 1, 1999, Watson was diagnosed as suffering from repetitive stress syndrome, and on June 10, 1999, a doctor again placed her on a restriction prohibiting her from engaging in repetitive motion of her upper right extremity. This time, the doctor characterized the restriction as "permanent." *Id.* at 7a-8a. When defendant learned of that diagnosis and physician-imposed restriction, it first placed plaintiff on what defendant termed "worker's compensation leave" (effectively, an involuntary lay-off), and then eventually formally terminated her employment. *Id.* at 8a.

In support of its argument that plaintiff was not "qualified" to work as an MO, defendant relied, in part, upon a statement in the Shaw affidavit that, "[a]n MO's essential functions are continuous and prolonged repetitive motions

using both hands[.]" *Id.* at 27a. In support of that assertion, Shaw, in turn, relied upon a document attached to her affidavit titled "Functional Job Description," which was dated July 1, 1998 (a date *after* plaintiff was first placed on temporary restrictions), and which purported to describe the "duties" and "functional requirements" of the MO position. *Id.* at 30a-33a. Nowhere in that "Functional Job Description" was the MO position described or characterized as involving "repetitive motions," let alone "continuous and prolonged repetitive motions using both hands."

As noted above, in opposing defendant's summary judgment motion, plaintiff submitted a sworn affidavit in which she specifically contested defendant's argument that "rotation" from line to line was an essential function of the MO position. That affidavit began with the statement: "I am a competent adult testifying regarding facts in my personal knowledge and awareness." *Id.* at 22a. In that affidavit, plaintiff swore that, upon her hiring, she herself had been "permanently assigned" to a single line, with only "occasional" transfers to other lines to meet "production needs." *Id.* That statement in her affidavit was consistent with her deposition testimony, in which she stated that, prior to the onset of her disability, she "might be moved [from line to line] a couple times a week" or "might not be moved at all." *Id.* at 15a-16a.[1]

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[1] Plaintiff did concede in her deposition testimony that, within a particular line, an MO would rotate from station to station "three to four times a day." App., *infra*, 15a. But that type of intra-line "rotation" was not the type of line-to-line "rotation" that the courts concluded rendered plaintiff not "qualified." Plaintiff clearly offered evidence that, even with intra-line, station-to-station "rotation," she was fully qualified to work at least certain lines. Defendant did not dispute this point for purposes of summary judgment. Thus, the "rotation" at issue in this case is not station-to-station rotation, but rather is line-to-line rotation.

Plaintiff also swore in her affidavit that *others* at the facility had been permitted to continue working with "non-repetitive motion restrictions similar to [her] own." *Id.* at 23a. Indeed, in her affidavit, she identified these other individuals by name, Vihn Evans and Lee McClain. *Id.* In other words, defendant did *not* require these individuals to "rotate" to all of the lines in the facility. Defendant did not dispute the factual accuracy of plaintiff's sworn statements concerning Vihn Evans and Lee McClain. Rather, defendant argued (in its reply brief in support of its motion for summary judgment) that it was permitted to "make 'exceptions to the rule' without running afoul of the ADA."

In her affidavit, plaintiff also indicated her belief that there were "several jobs" at the facility that "could be done by me or someone with my restrictions." *Id.* at 23a. And she also stated that "Kelly Mauer, a physical therapist, evaluated the Relocks line and determined that the line was within my temporary restrictions, which temporary restrictions were identical to the permanent restrictions later issued by Dr. Johnson." *Id.*; *see also id.* at 15a. This key point – that even with her physical restrictions, plaintiff was fully capable of working on certain of the lines within the facility – was not disputed by defendant.

In its ruling on defendant's summary judgment motion, the district court focused exclusively on the issue of whether plaintiff was "qualified" for the MO job. *Id.* at 12a-13a. The court, following Seventh Circuit precedent, held that plaintiff had the burden of proof on that issue. *Id.* at 12a. The court noted that, to be qualified, plaintiff had to show, *inter alia*, that "she was able to perform the essential functions of the job with or without accommodation." *Id.*

Relying exclusively on the Shaw affidavit, the court concluded that among the "essential functions" of the MO position were two that plaintiff was unable to perform,

namely, "repetitive motions involving both upper extremities," *id.* at 13a, and the ability "to *rotate* among the different assembly lines and/or stations as production requirements dictated," *id.* at 15a (emphasis in original). Because the court concluded that plaintiff had presented evidence that there were some lines on which she could work despite her restrictions (and thus that not all lines required the type of repetitive motion that plaintiff could not perform), the supposed requirement of "rotation" became the essential basis for decision.

With respect to plaintiff's contention that defendant had permitted others with similar restrictions to remain employed at the facility (thereby casting doubt on the true "essentialness" of rotation from line to line), the court simply ignored the sworn evidence contained in plaintiff's affidavit. Indeed, the court made no mention of that affidavit, but instead stated that plaintiff had provided no "record evidence supporting this argument," and faulted her for failing to "identify the workers who were accommodated" or the "nature of their restrictions." *Id.* at 17a. (Plaintiff's affidavit had, in fact, provided precisely this information. *Id.* at 23a.)

The district court concluded that plaintiff had "failed to meet her burden of establishing that she was a 'qualified individual' under the ADA," *id.* at 17a, and on that basis granted defendant's motion for summary judgment.

C. Proceedings In The Court Of Appeals

The court of appeals affirmed, ruling that, as a matter of law, plaintiff was not a "qualified individual" within the meaning of the ADA. In reaching that conclusion, the court construed the factual record in a manner unfavorable to plaintiff, and assumed facts favorable to defendant that were not supported by any evidence. The court stated that plaintiff "admits that rotation is Lithonia's norm and serves a

business purpose," App., *infra*, 3a, even though plaintiff had nowhere made such an admission. Having invented that "admission," the court then framed the question as whether the ADA required defendant to create an "exception" to that supposed rotation "norm." *Id.* Recognizing (as the district court had failed to do) that plaintiff's own sworn affidavit contained evidence that at least two other specific individuals had been permitted to continue working at the facility with restrictions similar to plaintiff's, the court of appeals sought a way around that affidavit. The court, purporting to apply Fed. R. Civ. P. 56(e), held that plaintiff's affidavit "was not based on personal knowledge and did not imply the availability of any admissible evidence." *Id.* (In so holding, the court failed to acknowledge that the affidavit, by its terms, stated that it set forth facts "in my personal knowledge and awareness." *Id.* at 22a.) Having set plaintiff's affidavit aside on that dubious basis, the court concluded that defendant's evidence was "uncontested." *Id.*[2]

With the supposed "admission" that rotation from line to line was the "norm" at defendant's facility, and with plaintiff's affidavit disposed of on procedural grounds, the

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[2] The court's determination that plaintiff's affidavit did not meet the "personal knowledge" criteria under Fed. R. Civ. P. 56(e) was plainly wrong. Defendant itself never raised a "personal knowledge" challenge to the affidavit in the court of appeals, and never offered any evidence contesting the factual accuracy of that portion of plaintiff's affidavit. The affidavit itself specifically stated that it was based upon personal knowledge. And, given the context of that affidavit – an employee who had worked within the facility – it was hardly surprising that she might have "personal knowledge" of how other employees were treated. *See Barthelemy v. Air Line Pilots Ass'n*, 897 F.2d 999, 1018 (9th Cir. 1990) ("[affiants'] personal knowledge and competence to testify [can be] reasonably inferred from their positions and the nature of their participation in the matters to which they swore"). In any event, as will be show below, even putting the affidavit aside, the decision of the court of appeals still would directly conflict with decisions of other courts and with the relevant EEOC regulations.

court of appeals then proceeded to the conclusion that plaintiff could not prevail. The court engaged in a discourse on the *theoretical* benefits of a "rotation" system that included "a pool of light-duty positions" (even though the evidence was contested as to whether, in fact, that is how defendant ran its facility). Those theoretical benefits (according to the court) included the possibility that the employer "can have experienced workers available for reassignment once they recover," *id.* at 4a, that by making the "light duty" positions only temporary and firing those with permanent restrictions, "other workers" would be able to use the temporary positions "during recovery," *id.*, and that by continually rotating workers through the temporary positions, the "frequency" of "repetitive-motion injuries" would be reduced, *id.* The court pointed to no evidence in the record to support any of those theoretical benefits because defendant had presented no such evidence. Despite this lack of evidentiary support, the court somehow arrived at the conclusion that "[plaintiff's] position, if adopted, thus would simultaneously increase the incidence of workplace injury and diminish the employer's ability to accommodate employees who have transient conditions." *Id.* at 5a.

Coming off of this discussion of the theoretical benefits of a theoretical rotation system, the court announced two legal rules. First, the court stated: "We conclude that the ADA does not require an employer that sets aside a pool of positions for recovering employees to make those positions available indefinitely to an employee whose recovery has run its course without restoring that worker to her original healthy state." *Id.* And second, the court stated: "A person is 'otherwise qualified' within the meaning of the ADA only if she can perform one of the regular jobs (with or without an accommodation)." *Id.*

Of course, claims under the ADA do not hinge upon an employer's "norms" or upon "regular jobs" – the terms used

by the court of appeals. Rather, they hinge upon "essential functions." Tellingly, the term "essential functions" appeared nowhere in the opinion of the court of appeals. That court simply drew new legal standards – divorced from the text and intent of the ADA – from the thin air of theoretical speculation.

REASONS FOR GRANTING THE WRIT

A. The Decision Below Presents An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court

The ADA prohibits discrimination against "a qualified individual with a disability because of the disability[.]" 42 U.S.C. § 12112(a). The term "qualified individual" is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C § 12111(8). Thus, the determination of whether a job function is "essential" often will also determine whether a person seeking or employed in that job is entitled to ADA protection. A person who can perform "essential" functions is protected from discrimination and is entitled to accommodation, including "restructuring" of the *non*-essential functions of the job. *See* 42 U.S.C. § 12111(9)(B). In contrast, a person who is unable to perform "essential" functions of the job has no ADA rights with respect to that job.

Despite the centrality of the concept of "essential functions" to the entire scheme of Title I of the ADA, the statute provides little guidance on how it is to be addressed. The ADA provides no definition of the term "essential functions." Nor does the ADA explain how courts are to resolve disputes concerning what functions are "essential." The ADA does not explain whether the employee or

employer has the burden of proof on this issue. And the ADA does not explain what type or quantum of evidence is either necessary or sufficient to establish whether particular functions are "essential."

Indeed, the sole guidance provided by the text of the statute is the statement that "consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job." 42 U.S.C § 12111(8). But even that statement – which is, after all, merely a truism (that obviously relevant information should be given "consideration" and "considered evidence") – adds little. It does not explain whether employer judgments and pre-advertisement job descriptions are to be accorded special weight, or rather merely treated as evidence to be considered along with whatever other evidence is available.

Not surprisingly, huge numbers of cases brought under the ADA have raised issues concerning the meaning of "essential functions" and how disputes on that issue are to be resolved. *See generally* "Who Is 'Qualified Individual' Under Americans With Disabilities Act Provisions Defining And Extending Protection Against Employment Discrimination To Qualified Individual With Disability," 145 A.L.R. Fed. 1 (1998 and supp.) (citing and discussing hundreds of cases). And, as will be demonstrated below, the courts of appeals have applied widely differing approaches to the issue. While some (such as the Seventh Circuit in this case) have given almost conclusive weight to an employer's assertions about what functions are "essential," and thus have favored disposition by way of summary judgment, others (for example, the Third, Sixth, Eighth and Ninth) have treated the issue as requiring multi-factor analysis not typically susceptible to determination "as a matter of law."

This multi-factor approach is consistent with the relevant EEOC regulations. *See* 29 C.F.R. 1630.2(n).

The issue of the meaning of "essential functions," and how disputes on that issue are to be resolved, also has significance beyond federal court litigation. The ADA, like most federal anti-discrimination statutes, has as its goal the regulation of primary conduct. *See, e.g., Faragher v. City of Boca Raton*, 524 U.S. 775, 805-06 (1998). Large-scale employers in particular are highly sensitive to this Court's interpretations of the ADA and other federal statutes that govern workplace conduct. Employers and employees alike need to know when an employee is or is not protected by the ADA, and what obligations the ADA imposes upon employers in that context. The meaning of "essential functions" goes to the very heart of that problem, because an understanding of a job's "essential functions" is necessary to determine whether the ADA does or does not require accommodation of a particular individual's disabilities. Uncertainty in this area of the law is particularly troublesome because either under- or over-enforcement of the ADA's prohibitions can impose great costs upon employers and employees, even putting aside the costs of litigation that such uncertainty breeds.

This Court already has recognized the general significance of the ADA, and the need for this Court's guidance with respect to application of that wide-ranging, but often perplexing, statute. In the relatively short time since the passage of the ADA in 1990, this Court already has considered and ruled upon many ADA case. Indeed, just last term, the Court issued four significant opinions on ADA-related issues.

But despite the Court's high level of activity in this area, the Court has not directly addressed the meaning of the crucial term "essential functions." In one of the cases

considered last term, *Chevron U.S.A., Inc. v. Echazabal*, __ U.S. __, 122 S. Ct. 2045 (2002), the "essential functions" issue was implicated by the question presented. The parties briefed the issue of whether the plaintiff in that case was "qualified" to perform the "essential functions" of the relevant job at issue. The Court, however, did not reach that issue in its opinion. *Id.* at 2047 n.1.[3]

In this case, unlike in *Echazabal*, the "essential functions" question is squarely presented. It was the sole basis for decision in both the district court and court of appeals. Petitioner respectfully suggests, therefore, that this case falls within the meaning of Supreme Court Rule 10(c), and that a grant of certiorari would be appropriate.

B. The Decision Below Conflicts With Decisions Of Other Circuit Courts, And With EEOC Regulations

The court of appeals (as had the district court) applied what amounted to a *per se* rule that, if an employer reserves to itself the right to "rotate" is employees from task to task within a large multi-task work environment, then *all* of the essential functions of *all* of those tasks must be considered "essential functions" of the relevant "position." And it applied that rule "as a matter of law" on a factual record that contained only the flimsiest evidence that this particular employer in fact considered "rotation" to be an important

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[3] The issue under Title I of the ADA of whether a job function is "essential" is conceptually similar, though not identical, to the issue under Title III of whether a modification to "policies, practices, or procedures" would "fundamentally alter the nature" of a public accommodation. 42 U.S.C. § 12182(b)(2)(A)(ii). The Court considered that issue in *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001). If that general conceptual issue was worthy of this Court's attention in the *Martin* case – which involved the application of the ADA to the rules of professional sports – then it clearly is worthy of the Court's attention here, where the impact on ADA-enforcement specifically, and the nation's economy more generally, is far greater.

aspect of how it ran its business. Specifically, that evidence consisted solely of a purported "job description" created *after* plaintiff was first injured, and an affidavit of defendant's human resources manager created solely for purposes of defendant's summary judgment motion. And neither of those documents evidenced a systematic or regular system of "rotation." Rather, the "job description" merely stated that an MO "may be switched at any given time from line to line," App., *infra*, at 30a, and the affidavit – unsupported by any form of underlying documentation – merely asserted that an MO could "from day to day" be "assigned to various lines throughout the plant . . . as production requirements dictated," *id.* at 27a. The only evidence in the summary judgment record of the *frequency* of line-to-line rotation came from plaintiff herself, and her affidavit and deposition testimony both indicated that such rotation was not a regular event, but rather was sporadic and *ad hoc*. *Id.* at 15a-16a, 22a-23a.

By deciding "as a matter of law" that plaintiff was not a "qualified individual" based upon defendant's own self-serving, after-the-fact, and factually unsupported characterizations of how it runs the facility, the court below placed itself squarely in conflict with decisions of other courts that have faced similar fact patters, and with applicable EEOC regulations.

For example, the Ninth Circuit in *Morton v. United Parcel Serv., Inc.*, 272 F.3d 1249 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 1910 (2002), faced a highly analogous set of facts. Plaintiff was a hearing-impaired employee of UPS who applied for the position of "package car driver," the sole job title for all UPS drivers. Because of her hearing impairment, plaintiff was not qualified under Department of Transportation ("DOT") regulations to obtain a DOT certification to drive vehicles with a gross weight in excess of 10,000 pounds. *Id.* at 1251. The great majority

(approximately 90%, *see id.* at 1254) of UPS's delivery trucks fell within that category, and UPS's stated policy was to hire as "package car drivers" only individuals who obtained DOT certification. Under UPS's seniority-based system, newly-hired "package car drivers" would not be assigned specific routes, but rather would be considered unassigned, or "swing," drivers who could be called upon, on a day-to-day basis, to fill in for other drivers who were on vacation or otherwise absent. *Id.* at 1251.

UPS took the position (almost identical to the position taken by defendant here) that "for logistical reasons relating to scheduling, UPS is justified in treating the ability to drive every UPS vehicle as an essential function of the job of package car driver." *Id.* at 1254. In other words, UPS argued that the ability to "rotate" its "swing" drivers from truck to truck was "essential," and that because plaintiff admittedly could not drive 90% of the trucks, she was not "qualified" for the job of "package car driver."

The district court had granted summary judgment in favor of UPS, but the Ninth Circuit reversed. Although plaintiff did not dispute that UPS did, in fact, have a generally applicable policy of only hiring DOT certified drivers, she contended (and offered at least some evidence) that UPS, through careful schedule management, could have kept her gainfully employed driving only trucks falling within the 10% that were below the 10,000 pound DOT threshold. The Ninth Circuit refused to give conclusive deference to UPS's own judgment as to what functions were "essential" to the "package car driver" job. The court stated that "[a]lthough consideration is given to the employer's view as to the essential functions of a job, 'an employer may not turn every condition of employment which it elects to adopt into a job function, let alone an essential job function, merely by including it in a job description.'" *Id.* at 1254 (quoting *Cripe v. City of San Jose*, 261 F.3d 877, 884 (9th

Cir. 2001)). And, citing the applicable EEOC regulations, the court stated that "[a] job's 'essential functions' are its 'fundamental' duties, not the 'marginal functions of the positions.'" *Id.* (*quoting* 29 C.F.R. § 1630.2(n)(1)). The court concluded that "a reasonable jury could determine that driving DOT vehicles was not an essential function of the job of package car driver." *Id.* at 1256.[4]

The decision below also is in conflict with the Sixth Circuit's decision in *Kiphart v. Saturn Corp.*, 251 F.3d 573 (6th Cir. 2001). That case involved facts almost identical to those presented here. Kiphart worked at a factory that produced Saturn automobiles. He suffered injuries that restricted his mobility, and (like plaintiff here) was placed on medical restrictions prohibiting certain specific types of repetitive movements. *Id.* at 577-78. For several years, Saturn moved Kiphart from one temporary position to another, but eventually placed him on "involuntary disability leave." *Id.* at 579.

Following a jury verdict in favor of Kiphart, the district court granted judgment as a matter of law in favor of Saturn, and Kiphart appealed. The Sixth Circuit reversed. On appeal, Saturn argued that Kiphart was not "qualified," arguing that the ability to "rotate" jobs within the factory was crucial to the way that Saturn ran its production facility. Saturn relied on evidence demonstrating that the "job rotation concept" played an "essential role" in Saturn's "operational vision," including testimony of employees and job announcements that "clearly stated the ability to fully rotate was a necessary qualification." *Id.* at 585.

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[4] *See also Cripe*, 261 F.3d at 887-89 (despite evidence of City's requirement that "all officers holding specialized-assignment positions . . . be able to make forcible arrests," court reasons that "such evidence is not conclusive" and holds that question whether ability to make forcible arrests was an "essential function" presented issue for the jury).

Despite this strong evidence of employer judgment of the necessity of "rotation," the Sixth Circuit reversed. In so doing, the court held that the *employer* has "the burden of proving that a challenged job criterion is essential, and therefore a business necessity," *id.* at 581[5], applied the multi-factor criteria of the EEOC regulations, 29 C.F.R. § 1630.2(n), *id.* at 584-85, and noted that, "'[t]he determination of whether a given function is "essential" within the meaning of the ADA and regulations promulgated thereunder is typically a question of fact and thus not suitable for resolution through a motion for judgment as a matter of law,'" *id.* at 585. The court – noting that plaintiff had presented evidence that "the teams simply did not operate as envisioned under the job rotation system," *id.* at 585 – concluded that "the actual consequences of not requiring employees to rotate fully appear far less severe than Saturn suggests," *id.* The court held that "a reasonable jury could infer . . . that full task rotation was not an essential job function," and thus that "Kiphart was otherwise qualified." *Id.* at 585-86. Thus, unlike the court of appeals in this case (which, as a matter of law, held "rotation" to be "essential" based solely on the employer's own after-the-fact assertions, and upon the *theoretical* benefits of "rotation"), the Sixth Circuit looked behind those assertions and theories, and determined that, in a particular work environment, "rotation" could only be considered "essential" if justified by proven business necessity.

The decision below also is in conflict with the Third Circuit's decision in *Skerski v. Time Warner Cable Co.*, 257

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[5] The subsidiary question of whether the employee or employer bears the burden of proving that particular job functions are or are not "essential" is one that has split the circuits. *Compare Kiphart*, 251 F.3d at 581 (burden on employer), *and Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1113 (8th Cir. 1995) (same), *with Laurin v. Providence Hosp.*, 150 F.3d 52, 58-59 (1st Cir. 1998) (burden on employee).

F.3d 273 (3d Cir. 2001). Skerski worked as a cable installer. Part of his job involved servicing overhead cable wires, which required him to climb ladders and poles. *Id.* at 257. He testified in his deposition that approximately 50% of his job required climbing, and the written job description for his position listing "pole climbing" and "ladder climbing" as among the required "physical tasks." *Id.* Ten years after he started working as a cable installer, Skerski began to experience dizziness, nausea and irregular heartbeats when working at heights, and was diagnosed as suffering from a panic and anxiety disorder. *Id.* His doctor recommended that he stop climbing, and avoid working at heights. *Id.*

For the next three years, Skerski was permitted to keep his job as an installer, and on a daily basis would be given assignments that required only "underground" work. *Id.* at 275-76. But then, after a change in supervisor, Skerski was told that he could no longer keep his job unless he returned to climbing. Unable to overcome his anxiety disorder, Skerski eventually was forced to take another job with the company, working at a warehouse, at which he earned substantially less money. *Id.* at 276-77. He then brought suit under the ADA, alleging that the company had failed to accommodate his disability in his prior job as a cable installer.

The district court granted summary judgment to the employer on grounds that "climbing was an essential function" of the installer position. *Id.* at 277. The Third Circuit, however, reversed. In so doing, the Third Circuit relied heavily upon the multi-factor analysis of the EEOC regulations, 29 C.F.R. § 1630.2(n). The court noted that "none of the factors nor any of the evidentiary examples [set forth in those regulations] alone are necessarily dispositive." *Id.* at 279. The court recognized that, under the regulations, the court owed "some deference" to the employer's own judgment that climbing was essential, and also that the

company's job description provided at least some evidence in support of the company's position. *Id.* at 280. But, in concluding that the case presented an issue for the jury, the court focused upon "the employee's actual experience," *id.* at 281 (citing 29 C.F.R. § 1630.2(n)(3)(iv), (vi) and (vii)), and upon the lack of evidence of "negative consequences resulted" from Skerski's failure to climb, *id.* (citing 29 C.F.R. § 1630.2(n)(3)(iv)). The court stated: "Skerski's ability to perform as an installer technician for more than three years without climbing might lead a reasonable juror to infer that Skerski's inability to climb had no adverse consequences for his employer, a factor that is relevant to determining what is an essential function." *Id.* at 283. The court concluded that, based upon its review of the factors and evidentiary examples provided by the EEOC regulations, a genuine issue of fact was presented as to whether climbing was an essential function of the installer position. *Id.*

The Third Circuit's decision in *Skerski* cannot be reconciled with the decision of the court of appeals in this case. Plaintiff – like Skerski – was permitted to retain her job as an MO for an extended period of time after the imposition of the same physical restrictions that later became the grounds for her firing. Under *Skerski*, that fact, standing alone, would have required denial of the defendant's summary judgment motion, because it tended to demonstrate that full line-to-line "rotation" was not the actual practice at the facility, and also that no "negative consequences" flowed from the failure of any particular employee to be "fully rotational." Accordingly, under the reasoning of *Skerski*, the evidence relied upon by the court of appeals here – the defendant's own after-the-fact assertions concerning the "essentialness" of full line-to-line rotation – would not have justified summary judgment in favor of the employer.

The decision below also is in conflict with the Eighth Circuit's decision in *Benson*, 62 F.3d 1108. Benson worked

as a mechanic for Northwest. He developed a neurological disorder known as Parsonage-Turner syndrome. Benson's doctor recommended that Benson "never again engage in work that involved extensive use of his left arm or repetitive motion of his left shoulder . . ." *Id.* at 1110. Northwest then moved Benson from position to position (although always as a mechanic) for some period of time, but ultimately terminated his employment. When Benson sued under the ADA, Northwest took the position that Benson was not "qualified" because his medical restrictions prevented him from performing the "essential functions" of a mechanic. *Id.* at 1111.

The district court granted summary judgment in favor of Northwest, but the Eighth Circuit reversed. The Eighth Circuit held that Northwest, as the employer, had the burden of producing "some evidence" of what the "essential functions" of the mechanic's job were. *Id.* at 1113. The Eight Circuit justified this allocation of the burden of production by reasoning that "much of the information which determines those essential functions lies uniquely with the employer." *Id.* at 1113. This allocation of the burden of production to the employer was crucial to the court's decision, because the court ultimately held that summary judgment was inappropriate because Northwest had failed to meet that burden. The court looked to the EEOC regulations, 29 C.F.R. § 1630.2(n), as a source for determining the type of evidence that would meet an employer's burden of production. *Id.* The court concluded that, "[w]ithout any supporting evidence from Northwest (other than a sketchy job description contained in the collective bargaining agreement), we decline to hold that all mechanics' positions encompass the same essential functions or that Benson could not perform the essential functions of the mechanics position he held when terminated." *Id.* at 1114. The Eight Circuit's allocation of the burden of

production to the employer, its reliance upon the EEOC regulations, and its refusal to uphold summary judgment in the face of the employer's own assertions concerning which functions were "essential" to the position of "mechanic," render its decision at odds with the decision of the Seventh Circuit in this case.

In addition to conflicting with the decisions of other courts of appeals, the decision below conflicts with applicable administrative regulations. The EEOC, the agency charged with enforcement of Title I of the ADA, has promulgated regulations that give definition to the term "essential functions" and that specify the type of evidence necessary to establish a position's "essential functions." *See* 29 C.F.R. § 1630.2(n) (reproduced at App., *infra*, 20a-21a). Unlike the approach of the court of appeals in this case, the EEOC regulations do not give conclusive, or even necessarily substantial, weight to an employer's own assertions. Rather, the EEOC regulations set forth a multi-factor approach intended to delve behind such assertions.

The regulations begin by defining "essential functions" and distinguishing them from "marginal" functions: "The term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires. The term 'essential functions' does not include the marginal functions of the position." 29 C.F.R. § 1630.2(n)(1).

The regulations then describe seven specific types of evidence that may be relevant to whether a particular function is essential. The first two are those explicitly mentioned in the ADA, namely, "employer's judgment" and "written job descriptions prepared before advertising or interviewing applicants for the job." 29 C.F.R. 1630.2(n)(3)(i)-(ii). The remaining types of evidence are: (1) the "amount of time spent on the job performing the

function"; (2) the "consequences of not requiring the incumbent to perform the function"; (3) the terms of any collective bargaining position; (4) the "work experience of past incumbents in the job"; and (5) the "current work experience of incumbents in similar jobs." 29 C.F.R. 1630.2(n)(3)(iii)-(vii).

As discussed above, many courts of appeals have deferred to these EEOC regulations as guidance in making judgments about whether, on particular facts, a function is "essential." *See also Echazabal*, 122 S. Ct. at 2051-53 (holding that EEOC regulations, recognizing a "threat-to-self" defense to ADA claims, were entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984)). In this case, the court of appeals neither mentioned nor applied the EEOC regulations. Those regulations, applied to the record here, clearly would have led to a different result.

Of the seven types of evidence specified in the regulations, only one – "employer's judgment" – weighed in favor of the court's determination, as a matter of law, that "rotation" was an essential function of the MO position. The remaining types of evidence either were inconclusive, or weighed *against* the court's ruling. For example, although defendant did present a purported "job description" of the MO position, that "job description" was *not* "prepared before advertising or interviewing applicants for the job." Rather, it was prepared not only after plaintiff was hired, but *after she was injured*.[6] Defendant presented *no* evidence of the "amount of time spent on the job performing the function."

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[6] *See also* EEOC's Technical Assistance Manual on the Employment Provisions (Title I) of the ADA § I-2.3a (Jan. 1992) ("If the employer intends to use a job description as evidence of essential functions, the job description must be prepared before advertising or interviewing for a job; a job description prepared after an alleged discriminatory action will not be considered as evidence.")

29 C.F.R. 1630.2(n)(2)(iii). Indeed, the only evidence on that point was plaintiff's own affidavit and deposition testimony, which suggested that "rotation" occurred only on a sporadic and *ad hoc* basis.

The defendant presented *no* evidence of the "consequences of not requiring" plaintiff to "rotate" among all of the lines in the facility. 29 C.F.R. 1630.2(n)(2)(iv). The court of appeals engaged in a lengthy discourse on what those consequences *might* be. App., *infra*, 3a-5a. But that discourse was purely theoretical, and unsupported by the evidence upon which defendant actually relied.

As for the "work experience" of past and current incumbents in the MO position, 29 C.F.R. 1630.2(n)(2)(vi)-(vii), again the defendant presented *no* evidence. Defendant presented no testimony or documents proving that MOs actually rotated from line to line on a regular or systematic basis. Again, the only actual evidence on this point came from plaintiff, who swore in an affidavit that *her* experience as an MO did *not* involve regular rotation to all lines, and that at least two other individuals with similar restrictions had been permitted to retain their jobs. App., *infra*, 22a-23a.

Thus, had the record evidence been viewed through the prism of the EEOC regulations (as many other courts of appeals would have done), the result clearly would have been different. Accordingly, the decision of the court of appeals cannot be reconciled with those regulations.

Because the decision of the court of appeals in this case conflicts both with decision of other courts of appeals, and with the EEOC regulations, petitioner respectfully suggests that this case falls within the meaning of Supreme Court Rule 10(a), and that a grant of certiorari would be appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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December 19, 2002

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Tamara Watson, Plaintiff-Appellant,

v.

Lithonia Lighting and National Service Industries, Inc.,
Defendants-Appellees.

No. 02-1423

Argued Sept. 6, 2002.
Decided Sept. 20, 2002.

Before POSNER, EASTERBROOK, and DIANE P. WOOD, Circuit Judges.

EASTERBROOK, Circuit Judge.

In July 1997 Tamara Watson went to work on the assembly lines of Lithonia Lighting in Crawfordsville, Indiana. Ten months later she suffered a shoulder injury that restricted her ability to perform the repetitive motions characteristic of assembly-line work. Lithonia assigned Watson a series of tasks that she remained able to complete. In June 1999 Watson's physician informed Lithonia that she would never again be able to perform any tasks that require repetitive motion of her upper right arm. Lithonia, which says that it requires all assembly-line workers to rotate through all positions (the better to avoid repetitive-stress injuries), concluded that it had no manual jobs available for someone with Watson's limitations, and it let her go. She sued under the Americans with Disabilities Act, contending that Lithonia should have given her as an accommodation on a permanent basis the sort of positions she held between May

1998 and June 1999.[†] The district court granted summary judgment in Lithonia's favor, ruling that it need not create a new position suited to her physical restrictions. 2002 WL 393076 (S.D. Ind. Jan. 14, 2002). That was a sound ruling. Even if Watson is "disabled" as the ADA uses that word in 42 U.S.C. § 12102(2)(A) – a doubtful proposition given the view that *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams,* 534 U.S. 184 (2002), took of repetitive-motion injuries – she was entitled only to a "reasonable" accommodation, and we have held that it is not "reasonable" to require an employer to create new jobs tailored to each employee's abilities. See, e.g., *Mays v. Principi,* 301 F.3d 866 (7th Cir. 2002); *Hansen v. Henderson,* 233 F.3d 521, 523-24 (7th Cir. 2000).

Watson concedes that, if all manual workers indeed rotate through all positions on Lithonia's assembly line, then it offers no jobs that she can perform, so that she is not "otherwise qualified". See 42 U.S.C. § 12112(b)(5)(A). See also, e.g., *Miller v. Illinois Department of Corrections,* 107

[†] The complaint named as defendants Lithonia Lighting and its corporate parent National Service Industries, Inc. Watson does not explain on what basis a parent corporation could be held liable, though National Service makes nothing of this. And it is not clear that any entity known as "Lithonia Lighting" exists today – or ever did. Lithonia Lighting appears to be a trade name for a line of products, not the name of any corporation. Cf. *Schiavone v. Fortune,* 477 U.S. 21, 106 S.Ct. 2379, 91 L.Ed.2d 18 (1986). According to Lithonia's web site, its corporate name is Acuity Lighting Group, Inc., and it is no longer National Service's subsidiary (having been spun off in November 2001 as a subsidiary of a newly formed Acuity Brands, Inc.). Yet the Rule 26.1 disclosure statement of defendants' brief, filed in May 2002, asserts that a "Lithonia Lighting" is a wholly owned subsidiary of National Service Industries. If it is or was a subsidiary, however, it must be a corporation, yet "Lithonia Lighting" does not include a corporate identifier (though "Acuity Lighting Group, Inc." does). We use "Lithonia Lighting" in the text without making further attempts to determine the identity and ownership of Watson's former employer.

F.3d 483, 485 (7th Cir. 1997). Moreover, Watson admits that rotation is Lithonia's norm and serves a business purpose; it is not a scheme cooked up to avoid obligations under the ADA. Rotation not only reduces the risk of injury caused by long-term repetition of particular motions but also, by qualifying every worker to perform each task on the line, facilitates production by making it easier for the firm to substitute among workers when some go on vacation or fail to appear without warning. Nonetheless, Watson contends that Lithonia makes exceptions to rotation – and if it makes exceptions for other employees, Watson insists, then it must accommodate her by making another.

One aspect of this contention appears in an affidavit that Watson filed. According to this affidavit, two employees have been allowed to do a subset of all assembly-line tasks rather than rotate through all of them. The difficulty with this submission is that Watson does not explain how she learned this or offer evidence from anyone with personal knowledge (such as one of the employees in question or a supervisor who assigns employees to tasks). Yet Fed. R. Civ. P. 56(e) provides: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Affidavits offered in support of or opposition to summary judgment create an issue of fact only to the extent that they provide evidence that would be admissible if offered live on the witness stand. See *Eisenstadt v. Centel Corp.*, 113 F.3d 738, 742 (7th Cir. 1997). Watson's affidavit was not based on personal knowledge and did not imply the availability of any admissible evidence. That leaves Lithonia's evidence uncontested.

There remains the possibility that Lithonia has non-rotating positions or slots that always are filled, though by a

changing cast of characters. An employer might establish a pool of light-duty positions (or other subsets of the full tasks) suited to employees recovering from injuries. See *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 696 (7th Cir. 1998). Lithonia provided such an accommodation to Watson so that she could continue working after her injury. This benefits not only the employee (by providing income and helping to keep skills honed) but also the employer, which can have experienced workers available for reassignment once they recover. This is exactly what the ADA encourages. Watson contends that, if an employer goes this far, it must allow an injured employee to occupy the light-duty (or limited-task) position indefinitely. Yet this would be bad news for the rest of the labor force. If an employer set aside, say, five positions for use by assembly-line workers recovering from repetitive-motion stress, on Watson's view the first five to occupy these positions would be entitled to keep them indefinitely. That would close the positions to other workers who might have been able to use them during recovery—and it would increase the frequency of repetitive-motion injuries in the workplace. For if the employer must station five workers at positions that do not require particular motions (such as movements of the upper right arm), other assembly line workers will be forced to spend a greater portion of their time in those positions and will be more exposed to repetitive-motion injury as a consequence. If injured workers occupy the five restricted-duty positions only temporarily, during recovery, this can be avoided: a given employee might be held off a line that requires the use of air guns (and thus the right shoulder) for a time, but her successor may be able to use air guns while refraining from connecting wires. Because the set of tasks allocated to the recovery positions would change with the occupants, an employer could maintain a rotation system for the workplace as a whole. Once the positions are permanently assigned, however, the rotation system is foiled

and its benefits lost. Watson's position, if adopted, thus would simultaneously increase the incidence of workplace injury and diminish the employer's ability to accommodate employees who have transient conditions.

We conclude that the ADA does not require an employer that sets aside a pool of positions for recovering employees to make those positions available indefinitely to an employee whose recovery has run its course without restoring that worker to her original healthy state. A person is "otherwise qualified" within the meaning of the ADA only if she can perform one of the regular jobs (with or without an accommodation). Watson cannot perform any assembly-line job at Lithonia; what she wants is a different job, comprising a subset of the assembly-line tasks, rather than an accommodation in the performance of one of Lithonia's existing assembly-line jobs (all of which entail all tasks). Because the ADA does not require employers to create new positions, the judgment of the district court is

AFFIRMED.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Tamara Watson, Plaintiff,

v.

Lithonia Lighting, d/b/a Hi-Tek Group, a wholly owned subsidiary of National Service Industries, Inc., and National Service Industries, Inc., Defendants.

IP 00-1744-C-M/S

Jan. 14, 2002.

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

LARRY J. McKINNEY, Chief Judge.

This matter is before the Court on Defendants Lithonia Lighting, d/b/a Hi-Tek Group ("Lithonia") and National Service Industries, Inc.'s Motion for Summary Judgment on Plaintiff Tamara Watson's ("Watson") claims of disability discrimination. Watson claims that Lithonia violated the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12102, *et seq.*, when it refused to accommodate her disability, placed her on involuntary unpaid leave, and then terminated her employment. The parties have fully-briefed the issues, and the matter is now ripe for ruling.

I. FACTS

Lithonia operates a manufacturing facility for fabrication of lighting fixtures in Crawfordsville, Indiana.

Statement of Material Facts ¶ 1. Lithonia utilizes assembly lines which, in turn, have various stations for the tasks involved in assembling a light fixture, depending on the item being produced. *Id.* ¶ 2.

Watson began her employment at Lithonia in July 1997 as a Manufacturing Operator ("MO"), which is a general labor position. *Id.* ¶ 3. Among the essential functions of an MO are repetitive motions involving both upper extremities, for all of the lines and nearly all of the stations among which Lithonia rotates persons in the classification. *Id.* ¶ 4. As an MO, Watson was not permanently assigned to any one station on an assembly line, or even one specific assembly line, but rather rotated among the lines throughout the plant, and from station to station on any given assembly line, as production requirements dictated. *Id.* ¶ 5.

In May 1998, Watson suffered an injury to her shoulder. *Id.* ¶ 6. It appears that over the next several months doctors imposed temporary physical restrictions on Watson with respect to her shoulder area, and then would release her to return to work without restrictions. *Id.* ¶ 8. When Watson was under temporary restrictions from the time of her injury until October 23, 1998, Lithonia gave her temporary light duty assignments. *Id.* ¶ 9. In particular, Lithonia assigned her to Line 47 (hooks), Line 30 (relock), Line 30 (cords), and Lines 10 and 11 (lamps). *Id.* ¶ 10.

In May 1999, Watson was placed on restrictions for her right thumb that required her to use a splint. *Id.* ¶ 12. As of June 1, 1999, Watson had been diagnosed with repetitive stress syndrome, which necessitated that she no longer use air guns. Lithonia then assigned her to Line 16, which apparently was within her restrictions. *Id.* ¶ 13. Her work on Line 16 did involve the repetitive use of her right arm, although she was not required to use air guns. *Id.* On June 10, 1999, Dr. Daniel R. Johnson ("Dr. Johnson") imposed

permanent restrictions that stated Watson could perform no repetitive motion with her right upper extremity. These permanent restrictions were reaffirmed on July 1, 1999, and July 27, 1999. *Id.* ¶ 14. Watson is right-handed. *Watson Dep.* at 14-15. Upon imposition of the permanent restrictions, and ever since, Watson has been unable to perform the essential functions of an MO position, namely those involving repetitive motion. *Id.* ¶ 15.

Lithonia then placed Watson on what it calls "worker's compensation leave," pursuant to the terms of its collective bargaining agreement with the IBEW Local 1048 and course of dealing between the company and the union. Because Lithonia never received notification that Watson's permanent restrictions prohibiting repetitive motions had been removed, at the expiration of such leave (which apparently was 12 months), it terminated her employment on June 11, 2000. *Id.* ¶ 16.

On November 10, 1999, Watson filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). *Def.'s Ex. 13.* Subsequent to her termination, Watson has found employment with two different employers. Each of those jobs required repetitive motion duties. *Id.* ¶ 25. She is unaware of the type and number of jobs for which she is qualified by her claimed disabilities. *Id.* ¶ 28. Watson also has no evidence to indicate how her current limitations would compare to others' abilities. *Id.* ¶ 29. With respect to her limitations on working, she estimates that she is only limited with respect to fast-paced repetitive motion jobs, a subset of repetitive motion jobs, which is a subset of general labor jobs. *Id.* ¶ 30.

II. STANDARDS

A. SUMMARY JUDGMENT STANDARDS

As stated by the Supreme Court, summary judgment is not a disfavored procedural shortcut, but rather is an integral part of the federal rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action. *Celotex Corp. v. Catrett,* 477 U.S. 317, 327 (1986); *see United Ass'n of Black Landscapers v. City of Milwaukee,* 916 F.2d 1261, 1267-68 (7th Cir.1990), *cert. denied,* 111 S.Ct. 1317 (1991). Motions for summary judgment are governed by Rule 56(c) of the Federal Rules of Civil Procedure, which provides in relevant part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Once a party has made a properly-supported motion for summary judgment, the opposing party may not simply rest upon the pleadings but must instead submit evidentiary materials which "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). A genuine issue of material fact exists whenever "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986). The nonmoving party bears the burden of demonstrating that such a genuine issue of material fact exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586-87 (1986); *Logan v. Caterpillar, Inc.,* 246 F.3d 912, 923 (7th Cir. 2001). It is not the duty of the court to scour the record in search of evidence to defeat a motion for summary judgment; rather, the

nonmoving party bears the responsibility of identifying the evidence upon which he relies. *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 562 (7th Cir. 1996). When the moving party has met the standard of Rule 56, summary judgment is mandatory. *Celotex*, 477 U.S. at 322-23; *Shields Enters., Inc. v. First Chicago Corp.*, 975 F.2d 1290, 1294 (7th Cir. 1992).

In evaluating a motion for summary judgment, a court should draw all reasonable inferences from undisputed facts in favor of the nonmoving party and should view the disputed evidence in the light most favorable to the nonmoving party. *Estate of Cole v. Fromm*, 94 F.3d 254, 257 (7th Cir. 1996), *cert. denied*, 519 U.S. 1109 (1997). The mere existence of a factual dispute, by itself, is not sufficient to bar summary judgment. Only factual disputes that might affect the outcome of the suit in light of the substantive law will preclude summary judgment. *Anderson*, 477 U.S. at 248; *JPM Inc. v. John Deere Indus. Equip. Co.*, 94 F.3d 270, 273 (7th Cir. 1996). Irrelevant or unnecessary facts do not deter summary judgment, even when in dispute. *Clifton v. Schafer*, 969 F.2d 278, 281 (7th Cir. 1992). "If the nonmoving party fails to establish the existence of an element essential to his case, one on which he would bear the burden of proof at trial, summary judgment must be granted to the moving party." *Ortiz v. John O. Butler Co.*, 94 F.3d 1121, 1124 (7th Cir. 1996), *cert. denied*, 519 U.S. 1115 (1997).

On certain occasions, the Seventh Circuit had suggested that a court approach a motion for summary judgment in an employment discrimination case with a particular degree of caution. *See, e.g ., Sarsha v. Sears, Roebuck & Co.*, 3 F.3d 1035, 1038 (7th Cir. 1993); *Holland v. Jefferson Nat'l Life Ins. Co.*, 883 F.2d 1307, 1312 (7th Cir. 1989). The language implied that summary judgment might be less appropriate in this context based upon the presence of issues of motive and

intent. *Holland,* 883 F.2d at 1312. As the Seventh Circuit has recently emphasized, however, these cases do not establish a heightened summary judgment standard for employment-related cases. Instead, the language from the prior cases simply means "that courts should be careful in a discrimination case as in any case not to grant summary judgment if there is an issue of material fact that is genuinely contestable, which an issue of intent often though not always will be." *Wallace v. SMC Pneumatics, Inc.,* 103 F.3d 1394, 1396 (7th Cir.1997). Even when discriminatory intent is at issue, summary judgment is appropriate when the nonmovant presents no evidence to indicate motive or intent in support of her position. *See Holland,* 883 F.2d at 1312. Further, the nonmovant will not defeat summary judgment merely by pointing to self-serving allegations without evidentiary support. *Cliff v. Board of School Comm'rs,* 42 F.3d 403, 408 (7th Cir. 1994).

B. ADA STANDARDS

The ADA prohibits certain employers from discriminating against "a qualified individual with a disability because of the disability of such individual in regard to ... [the] terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). The Act also requires covered entities to provide "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship ..." *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams,* 2002 WL 15402, *7 (U.S. January 8, 2002) (quoting 42 U.S.C. § 12112(b)(5)(A) (1994 ed.)). To be entitled to the protections of the Act, however, an employee must be a qualified individual with a disability. The Act defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation,

can perform the essential functions of the employment position that such individual holds or desires." *Id.* (quoting 42 U.S.C. § 12111(8)). The Act further defines the term "disabled," but the Court can resolve Lithonia's motion without analyzing whether Watson met that particular definition. With these standards in mind, the Court will now consider the parties' arguments.

III. DISCUSSION

The parties vigorously dispute whether Watson was "disabled," but for now the Court will assume that she was and will instead focus upon whether she was a qualified individual with a disability. If she was not, her case is over, because to establish a prima facie case for a disparate treatment or failure to accommodate claim under the ADA, Watson must establish this element. *See Tyler v. Ispat Inland, Inc.*, 245 F.3d 969, 972 (7th Cir. 2001) (disparate treatment); *McPhaul v. Board of Commissioners of Madison County, Indiana*, 226 F.3d 558, 563 (7th Cir. 2000), *cert. denied*, 121 S.Ct. 1358 (2001) (failure to accommodate). The ADA defines a "qualified individual with a disability" as one "with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position...." 42 U.S.C. § 12111(8).

It is well-established that a plaintiff has the burden of proving that she is "qualified" to perform the essential functions of the job she holds or seeks, with or without reasonable accommodation. *Bay v. Cassens Transport Co.*, 212 F.3d 969, 973-974 (7th Cir. 2000) (citing *Best v. Shell Oil Co.*, 107 F.3d 544, 547-48 (7th Cir. 1997); *Weiler v. Household Fin. Corp.*, 101 F.3d 519, 524 (7th Cir. 1996); *DeLuca v. Winer Indus., Inc.*, 53 F.3d 793, 797 (7th Cir. 1995)). The Court's inquiry into whether Watson was qualified to perform her duties as an MO at Lithonia involves a two-step analysis. *Id.* at 974 (citing *Bombard v.*

Fort Wayne Newspapers, Inc., 92 F.3d 560, 563 (7th Cir.1996)). The Court first considers whether Watson "satisfies the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses, etc." *Id.* (quoting 29 C.F.R. app. § 1630.2(m)). If she possesses the appropriate prerequisites for the position, the Court then considers whether Watson "can perform the essential functions of the position held or desired, with or without reasonable accommodation." *Id.* Whether or not Watson meets the definition of a qualified individual with a disability is to be determined as of the time the employment decision was made. *Id.* (citing *Weiler*, 101 F.3d at 524).

The parties do not dispute that Watson met the prerequisites for the position, so the Court need not address that issue. Watson must also show, however, that she was able to perform the essential functions of the job with or without accommodation. This she has not done.

To determine the essential functions of a position the Court may consider evidence of Lithonia's judgment of a position, written job descriptions prepared before advertising or interviewing applicants for the job, the work experience of past incumbents of the job, and the work experience of current incumbents in similar jobs. *Basith v. Cook County*, 241 F.3d 919, 927 (7th Cir. 2001) (citing 29 C.F.R. § 1630.2(n)(3)). Lithonia has presented evidence that the essential functions of the MO position requires repetitive motions involving both upper extremities. Lithonia has also shown that the MO position involves repetitive motions involving both hands, the use of power and other hand tools, lifting, stretching, and pulling above shoulder level, and gripping and manipulating various components. *See Charlotte Shaw Aff.* ¶ 9. Watson herself testified at length about the duties involved in her job on the assembly line, many of which required repetitive motions. In addition,

employees in the MO position were not permanently assigned to any one station on an assembly line, or even to one specific assembly line, but were assigned to various assembly lines and/or stations as production requirements dictated. *Id.* ¶ 10.

When Dr. Johnson permanently restricted Watson from any repetitive motion with her right upper extremity, Watson admitted that she could no longer perform the essential functions of the MO position. In fact, in response to an interrogatory from Lithonia, Watson affirmed that, "I will never be able to do repetitive work again." *Defendants' Ex. A-1.* As late as June of 2000, Watson admitted that she could not have done any job requiring the use of her hands or wrists for a prolonged period of time. *Watson Dep.* at 115. She also conceded that of the various repetitive motions that she described as part of an MO position, she could not have performed all of them after she had her permanent restrictions. *Watson Dep.* at 28. Finally, in her affidavit submitted with her response to Lithonia's Motion for Summary Judgment, Watson stated that, "In general I could not do the fast repetitive work required by the assembly lines but there are many other jobs." *Watson Aff.* ¶ 5.

Without any supporting record evidence, Watson first denies Lithonia's description of the essential functions of the MO position. *See Watson's Brief* at 8. While courts will generally "look to see if the employer actually requires all employees in a particular position to perform the allegedly essential functions, we do not otherwise second-guess the employer's judgment in describing the essential requirements for the job." *Basith,* 241 F.3d at 928 (7th Cir. 2001) (quoting *DePaoli v. Abbott Laboratories,* 140 F.3d 668, 674 (7th Cir. 1998) (citations omitted)). Watson's bare allegation that Lithonia's description is incorrect is insufficient to overcome this deference. Instead, Watson must offer sufficient evidence to show that Lithonia's

understanding of the essential functions of the job is incorrect, and she has not done so. *Id.* at 928-929 (citing *Martinson v. Kinney Shoe Corp.*, 104 F.3d 683 (4th Cir. 1997) (adopting employer's judgment of essential function where plaintiff failed to provide any evidence at summary judgment stage to dispute employer's understanding of essential functions); *Milton v. Scrivner, Inc.*, 53 F.3d 1118, 1124 (10th Cir. 1995) (same)).

Watson argues that she could not perform the fast assembly line jobs, but that there were many other jobs. The "other job" apparently is in reference to a particular assembly line job in "re-lock."[1] A physical therapist had evaluated the work requirements on that line and determined that it was within Watson's restrictions. The problem with this argument is that it ignores the fact that one of the essential functions of the MO position was to *rotate* among the different assembly lines and/or stations as production requirements dictated. Watson confirmed in her deposition that this type of rotation among jobs and tasks was required of her position:

> Q: Okay. You said there were various stations and you've described those for the Line 8 assembly function. Would you move from station to station as an MO at Lithonia Lighting?
> A: Yes.
> THE WITNESS: On Line 8?
> MR. MASUR: Yes.
> A (Continuing): Yes, we would rotate.
> Q: How often would you rotate from station to station?
> A: I think it was like three to four times a day.

---

[1] The parties do not fully explain the nature of the "re-lock" line, but the Court understands it to be one of the lines to which an MO may be rotated as part of her daily job.

Q: So approximately how many hours would you—Would it be fair to say that you worked approximately two to three hours at any given station when you were building light fixtures?
A: Between one and three, I'd say.
Q: And while you were working at a specific station would you repetitively perform the functions of that station over and over?
A: Yes.
Q: You also mentioned that you might move from line to line. Could you describe to me when that might happen and how that might happen?
A: If you were low on work, you would be moved. If they needed help on another line, you'd be moved.
Q: When you say you would be moved, what kind of job duties would you be moved to or where would you go to? Can you give me an example?
A: You would go all over the plant. You could go to different lines. They could send you to relocks.
THE WITNESS: You're talking prior to the injury, right?
MR. MASUR: Prior to the injury, right.
A: (Continuing) You'd just go to different lines and sometimes go to relocks. I know there was like 42 and Line 25 and 23 and just I don't know how many lines are out there. There is a lot.
Q: And did that happen frequently that you'd be moved from line to line while you were working at Lithonia Lighting prior to your injuries?
A: You might be moved a couple times a week. Sometimes you might not be moved at all.
Q: And that happened to you personally, right? You would personally be moved?
A: It was normal, yes.

Watson Dep. at 25-26.

As a result, her argument that she could work on one of the slower lines or on one particular line that a physical therapist determined was within her restrictions is without merit. Even assuming that to be true, it does not establish that she was able to rotate among all of the different lines and stations in the plant, which was one of the essential functions of the MO position.

Finally, Watson contends that "some workers with similar restrictions were accommodated and remain employed at Hi-Tek. So not all workers must rotate through all jobs and it is not essential to the position that they can do so." *Watson's Brief at 9.* Watson's point apparently is that because there were some other workers who were relieved of the requirement of rotating among jobs—as an accommodation—that shows that rotation was not an essential function of the position. Again, Watson provides no citation to any record evidence supporting this argument. In addition, she does not identify the workers who were accommodated, the nature of their restrictions, and whether those restrictions were permanent or temporary. Without such evidence, Watson has failed to show that rotating among the lines was not an essential function of the MO position. She also has not explained what, if any, accommodation would have allowed her to perform the essential functions of her position with her permanent restrictions.

In sum, Watson has failed to meet her burden of establishing that she was a "qualified individual" under the ADA. As a result, her disparate treatment claim fails as a matter of law. In addition, even if she had a failure to accommodate claim—a claim that Lithonia argues is outside the scope of her EEOC charge and thus not properly before the Court—it would fail for the same reason. Accordingly,

the Court GRANTS Lithonia's Motion for Summary Judgment on all of Watson's claims.

IT IS SO ORDERED this 14th day of January, 2002.

TITLE I OF THE AMERICANS WITH DISABILITIES ACT OF 1990

42 U.S.C. § 12111. Definitions

As used in this subchapter:

* * * *

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

* * * *

42 U.S.C. § 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

EEOC REGULATIONS UNDER THE ADA

29 C.F.R. § 1630.2. Definitions.

(n) Essential functions –

(1) In general. The term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position.

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

> (i) The function may be essential because the reason the position exists is to perform that function
>
> (ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or
>
> (iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

> (i) The employer's judgment as to which functions are essential;
>
> (ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

TAMARA WATSON, Plaintiff, v. LITHONIA LIGHTING, d/b/a HI-TEK GROUP, a wholly owned subsidiary of NATIONAL SERVICE INDUSTRIES, INC. and NATIONAL SERVICE INDUSTRIES, INC. Defendants.	Cause No. IP-001744-C-M/S

AFFIDAVIT

Tamara Watson, states and affirms:

1. That I am a competent adult testifying regarding facts in my personal knowledge and awareness.

2. That the "latest discrimination" date on the EEOC complaint form, which shows "11-10-98" is a writing error by the typist, and that such date should be November 10, 1999, the date the form was signed.

3. That as an employee at Hi-Tek, prior to my restrictions, I was assigned permanently to Line 7 and would only occasionally be transferred to other departments or lines to meet production needs.

4. That to my knowledge, there are at least two people working at Hi-Tek, Vihn Evans and Lee McClain, who are on non-repetitive motion restrictions similar to my own.

5. That there are several jobs presently at Hi-Tek which I believe could be done by me or someone with my restrictions. In general I could not do the fast repetitive work required by the assembly lines but there are many other jobs.

6. That Kelly Mauer, a physical therapist evaluated the Relocks line and determined that the line was within my temporary restrictions, which temporary restrictions were identical to the permanent restrictions later issued by Dr. Johnson.

7. That the shoulder injury did affect my daily routines, my major life activities; it interfered with my ability to care for my house, my children and husband and my ability to attend to my own personal hygiene. The injury interfered with my ability to play ball with my children and to do any two handed activity.

8. That I believed my statement to my supervisors that I could not keep up on the line would and was clearly understood as being related to my injury since I had just been released from restrictions. This was a personal request for reasonable accommodation.

9. Hi-Tek never did work hardening after my restrictions were removed, rather they simply placed me on fast repetitive lines which irritated or aggravated my mostly healed injuries. If H.i-Tek had adequately done work hardening, I do not believe my injuries would have worsened and accumulated to the point where permanent restrictions were the only solution.

10. That the Attached exhibit B is a true and accurate copy of my medical records including restrictions from Dr. Kaveny which were not inc]uded in Defendant's Exhibit 2.

FURTHER AFFIANT SAITH NOT.

_____

Tammy Watson AFFIANT

STATE OF INDIANA, MONTGOMERY COUNTY SS:

Subscribed and sworn to before me, a Notary Public residing in Montgomery County, State of Indiana, this 18th day of October, 2001.

_____

NOTARY PUBLIC

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

TAMARA WATSON, Plaintiff, v. LITHONIA LIGHTING, d/b/a HI-TEK GROUP, a wholly owned subsidiary of NATIONAL SERVICE INDUSTRIES, INC. and NATIONAL SERVICE INDUSTRIES, INC. Defendants.	Cause No. IP-001744-C-M/S

AFFIDAVIT OF CHARLOTTE K. SHAW

I, Charlotte K. Shaw, being duly sworn upon my oath, state that:

1. I have personal knowledge of the matters contained herein and am competent to testify regarding them.

2. I am employed as the Manager of the Human Resources Department for Defendants ("Lithonia" or the "Company") in the above-captioned cause, and have held this position for approximately three (3) years. Lithonia, which does business as "Hi-Tek Group," manufactures and distributes a variety of lighting fixtures and operates a manufacturing facility at which Plaintiff was employed in Crawfordsville, Indiana.

3. As the Manager of the Human Resources Department, I am responsible for the general direction and oversight of the Human Resources Department, including assuring compliance with all state, federal and local laws, administration of all benefits, including workers' compensation claims, employment decisions throughout the plant, and labor relations. I am the custodian of, and have access to, the Company's documents relating to these items

4. Lithonia, at its Crawfordsville manufacturing operations, utilizes assembly lines which, in turn, have various stations for the tasks involved in assembling a light fixture, depending on the item being produced.

5. I am familiar with Plaintiff's work history while employed with Lithonia, and was personally involved in the oversight and administrative details pertaining to Plaintiff's injuries and physical conditions for the period of May 1998 through the date of this Affidavit.

6. Plaintiff began her employment with Lithonia on July 21, 1997 as a full-time Manufacturing Operator ("MO") at the Crawfordsville plant. This position has among its essential functions the repetitive use of both upper extremities, and is considered to be a general labor classification. Attached Exhibit 1 is the Company's record of Plaintiff's hire.

7. The employees of Lithonia's Crawfordsville plant are represented by International Brotherhood of Electrical Workers Local 1048 ("IBEW" or "Local 1048"), and are subject to a Collective Bargaining Agreement ("CBA") with IBEW, the terms of which are set forth in the document identified as Exhibit 9 to Plaintiff's August 6, 2001 deposition.

8. Plaintiff was a member of an IBEW bargaining unit as an MO while employed with Lithonia.

9. An MO's essential functions are continuous and prolonged repetitive motions using both hands, the use of power and other hand tools, lifting, stretching and pulling above shoulder level, and gripping and manipulating various components, wires, and fasteners used in assembling a light fixture. Attached Exhibit 2 is the Company's documentation of those essential functions.

10. As an MO, Plaintiff was not permanently assigned to any one station on an assembly line, or even one specific assembly line, but rather from day to day was assigned to various lines throughout the plant, and from station to station on any given assembly line, as production requirements dictated.

11. In May 1998, I was informed that Plaintiff had suffered a work-related injury to her shoulder. I became involved in the oversight of Plaintiffs worker's compensation claims relating to the injury, as well as the Company's provision of leave to her and her return to the workplace.

12. Over the course of the next two years, although physicians may have intermittently imposed temporary physical restrictions concerning Plaintiff's right shoulder, arm or hand, medical providers repeatedly informed Lithonia that Plaintiff could work, with no physical restrictions whatsoever, as indicated by Watson Dep., Exh. 8, pp. 208.

13. When under temporary restrictions, prior to her October 23, 1998 release to return to work without restrictions, Lithonia gave Plaintiff certain temporary light duty assignments, to positions which had limited functions, on one or more of line 47 (hooks), line 30 (cords), line 30 (relock), and lines 10 and 11 (lamps), all in accordance with her restrictions.

14. In May 1999, I was informed that Plaintiff was placed on restrictions requiring use of a splint for her right thumb, as evidenced by Watson Dep. Exh 2, p. 1.

15. At the beginning of June 1999, I was told she was diagnosed with repetitive stress syndrome and was placed on additional restrictions, prohibiting her use of air guns for a period of three weeks, as evidenced by Watson Dep. Exh. 2, pp. 2-4. Consequently, Lithonia assigned her with a restriction of "no air guns."

16. On June 10, 1999, Plaintiff was placed on permanent restrictions that precluded her from performing any repetitive duties, as evidenced by Watson Dep. Exh, 2, pp. 5-6 These restrictions were confirmed twice thereafter — once on July 1, 1999, and again on July 27, 1999, as evidenced by Watson Dep. Exh. 2, pp. 5-9.

17. When I learned of Plaintiff's permanent restrictions in June 1999, I reviewed the open positions within Lithonia and the various essential functions of an MO. Based on this review, I determined that Lithonia did not have any non-temporary positions open that did not have essential functions beyond her permanent restrictions.

18. Lithonia, pursuant to the CBA and the custom and practice of Local 1048 and Lithonia, Lithonia placed Plaintiff on "workers' compensation leave" as of June 11, 1999.

19. Workers' Compensation Leave was provided to Plaintiff for a period of one year. Since, to date, Lithonia has not been advised of Plaintiff's repetitive motion restrictions have been removed, and there were no non-temporary positions that would fit Plaintiff's permanent restrictions, Lithonia terminated Plaintiff's employment on June 11, 2000.

20. The Lithonia – IBEW 1048 CBA has specific provisions concerning permanent transfers to other classifications, as well as filling temporary job vacancies, at Section 10 and 11 of the CBA, Article XI concerning seniority. In short, seniority is the determining factor, and

then only after an employee "bids" for the position. Plaintiff never submitted any such bid.

21. Neither I nor Lithonia believed that Plaintiff had either a disability or some condition apart from a disability that would have a substantially limiting effect on Plaintiff's ability to care for herself, to walk, to see, to hear, to speak, to breathe, to learn or to work.

22. Neither I nor Lithonia have ever received any indication that Plaintiff had a disability, or a desire to accommodation, apart from a June 5, 2000 letter from Local 1048; however, the letter did not advise as to what disability was being claimed

23. Lithonia has annually provided awareness training, no less than four times per year, commencing in May 2000. At least one training session is on non-discrimination under Title VII, the Americans With Disabilities Act, and the Age Discrimination Employment Act; at least concerns other laws, statutes and ordinances, including, but not limited to, those addressing the issue of harassment. Such anti-discrimination and anti-harassment training is also performed at the time of hire.

Further, Affiant sayeth not.

I AFFIRM UNDER PENALTIES FOR PERJURY THAT THE FOREGOING REPRESENTATIONS ARE TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF.

_____

Charlotte K. Shaw, Manager, Human Resources Department, Lithonia Lighting

Exhibit 2 Of Affidavit of Charlotte K. Shaw

The document bears a date-stamp indicating: "Received JUL 01 1998 Lithonia Hi-Tek Medical Dept."

FUNCTIONAL JOB DESCRIPTION
LITHONIA HI-TEK
DEPARTMENT: ASSEMBLY
POSITION: MANUFACTURING OPERATOR

The information in this report is based on observations at the job site on Thursday, June 18, 1998. I was accompanied at the Job Site Evaluation by Mary Shroyer, Plant Nurse of Lithonia Hi-Tek and Curt Samulowitz, Jeff Lucas, Larry Meadows, and Annie McCormik all Production Supervisors.

I. General Description of Duties -- Employees working as Manufacturer Operators in the Assembly Department are required to perform a wide variety of tasks based on the particular line and cell in which they are working. The employees may be switched at any given time from line to line, therefore, must be able to perform the maximum requirements of each particular line. The only exempt position for Manufacturing Operations is that of a Tester.

Employees work an 8-hour shift with overtime available on an occasional basis. Each line performs job rotation within the positions on the line every 1 to 2 hours or on designated breaks. The number of employees working on any line or cell varies depending on the needs of that area. The employees may be working with a group as large as 30 individuals or as small as 3.

Employees work in a warehouse type facility with concrete floors, bright overhead lighting and good ventilation. All employees are required to wear protective eye gear.

II. Weights and Equipment -- Product utilized in the Assembly Department varies depending on the type of wire and amount of product being used. In general, an individual employee must be able to lift up to 50 lbs. independently. However, when product and or supplies weighs greater than 50 lbs. the employee must get assistance of another employee or utilize a vacu-hoist. Tools utilized throughout the Assembly Department by the Manufacturing Operator include the following: air powered tools both inline and pistol grip to include some suspended and not suspended tools, (in several places along lines 7 and 34 heavy air guns are utilized which weigh approximately 20 lbs.) All air tools may be operated with either UE. Other tools include: hammer/mallet, pliers, wire cutters, scissors, knife, broom, tape, and pen.

III. Functional Requirements

Standing - CONSTANT - Employees will be standing either at a workbench or a conveyor belt, height ranges from 32 to 35".

Walking - OCCASIONAL - The employee may walk anywhere along the work line or the cell delivering and/or getting supplies. Walking need not be at an excessive speed and may include walking no more than 50 feet at one time.

Sitting - OCCASIONAL - The employee may be able to sit while performing a few particular job tasks within a cell or at a workstation. Sitting is on a stool either with or without a back support

Forward Bending - OCCASIONAL - Bins of product are located at shelves of various heights from floor to overhead. The employee will occasionally be required to place product here and to retrieve product. The amount lifted is left to the employee's discretion based on their physical capabilities. Forward bending may be required as well when placing finished product on to skids at a height of a minimum 6".

Reaching at or above Shoulder Height - OCCASIONAL - The employees must be able to work above shoulder height with a reach of at least 16" with the (B) UE's. This movement is performed when retrieving product from overhead shelves at a height of approximately 55", forming large boxes, operating a vacu-hoist, and stacking a skid (maximum height 50") , as well as, with other ancillary tasks.

Reaching Chest Height: - CONSTANT - The employee must be able to work at or below chest height while performing a reach of up to 30" away from body center with the (B)UE's. This movement is performed when making of all product within the Assembly Area.

Cervical Motion - MINIMAL - The employee works in a controlled environment with minimal need to perform cervical rotation and side bending outside of 20° normal motion.

Squatting - MINIMAL - The employee may choose to squat versus' forward bending.

Kneeling - NEVER

Crawling – NEVER

Climbing – NEVER

Simple Grasp - CONSTANT - For (B) UE's. Employee will perform simple grasp when handling of parts, boxes, and product throughout the Assembly Department.

Firm Grasp - CONSTANT - With the (B) UE's when the employee is utilizing the air tools, or creating product.

Fine Manipulation - CONSTANT - This activity is performed with a (B) UE's when handling the wires, parts, supplies, as well as, handling various tools such as the pliers and wire cutters.

Carry - OCCASIONAL - Employee may be required to carry up to 50 lbs. for a distance up to 50 feet This may include taking trash to the dumpsters or retrieving or stacking product.

Job Classification -- MEDIUM*

_____

Sheila Denman, MA, MS, PT

*Based on US Department of Labor; Dictionary of Occupational Titles 4th Edition.

No. 02-959

Supreme Court, U.S.
FILED
JAN 22 2003
CLERK

In The
Supreme Court of the United States

TAMARA WATSON,

Petitioner,

v.

LITHONIA LIGHTING, D/B/A HI-TEK GROUP, A WHOLLY OWNED SUBSIDIARY OF NATIONAL SERVICE INDUSTRIES, INC., AND NATIONAL SERVICE INDUSTRIES, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the court of appeals correctly affirm summary judgment against the plaintiff on her claims under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*, when the court of appeals determined plaintiff was unable to perform the *sine qua non* of a manufacturing operator ("MO") position – job rotation?

PARTIES TO THE PROCEEDING BELOW AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondents respectfully submit this Corporate Disclosure Statement.

Respondent, Lithonia Lighting, a division of Acuity Lighting Group, Inc., is a wholly owned subsidiary of Acuity Brands, Inc. Respondent, Lithonia Lighting, no longer uses the d/b/a of Hi-Tek Group. Respondent, National Service Industries, Inc., no longer holds any ownership interest in Lithonia Lighting.

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I. REASONS FOR DENYING THE WRIT

A. The decision below should stand as the Petitioner failed to meet her burden of production to survive summary judgment.

The Petitioner is attempting to create an issue for *certiorari* that was not before the Seventh Circuit. The issue before the Seventh Circuit was simply whether the Petitioner had presented sufficient evidence to the district court to survive summary judgment.

Summary judgment for a defendant is appropriate when the plaintiff "fails to make a showing sufficient to establish the existence of an element essential to [her] case, and on which [she] will bear the burden of proof at trial." *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 805-06 (1999) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). An ADA plaintiff bears the burden of proving that she is a "qualified individual with a disability" – that is, a person "who, with or without reasonable accommodation, can perform the essential functions" of her job. *Cleveland*, 526 U.S. at 806 (quoting 42 U.S.C. § 12111(8)).

As highlighted by the district court, Watson admitted an inability to show herself able to perform the essential functions of her MO position; the Seventh Circuit properly affirmed summary judgment on that basis:

> **Q:** Okay. You said there were various stations and you've described those for the Line 8 assembly function. Would you move from station to station as an MO at Lithonia Lighting?
>
> **A:** Yes.
>
> **THE WITNESS:** On Line 8?

MR. MASUR: Yes.

A: (Continuing) Yes, we would rotate.

Q: How often would you rotate from station to station?

A: I think it was like three to four times a day.

Q: So approximately how many hours would you – Would it be fair to say that you worked approximately two to three hours at any given station when you were building light fixtures?

A: Between one and three, I'd say.

Q: And while you were working at a specific station would you repetitively perform the functions of that station over and over?

A: Yes.

Q: You also mentioned that you might move from line to line. Could you describe to me when that might happen and how that might happen?

A: If you were low on work, you would be moved. If they needed help on another line, you'd be moved.

Q: When you say you would be moved, what kind of job duties would you be moved to or where would you go to? Can you give me an example?

A: You would go all over the plant. You could go to different lines. They could send you to relocks.

THE WITNESS: You're talking prior to the injury, right?

MR. MASUR: Prior to the injury, right.

> **A:** (Continuing) You'd just go to different lines and sometimes go to relocks. I know there was like 42 and Line 25 and 23 and just I don't know how many lines are out there. There is a lot.
>
> **Q:** And did that happen frequently that you'd be moved from line to line while you were working at Lithonia Lighting prior to your injuries?
>
> **A:** You might be moved a couple times a week. Sometimes you might not be moved at all.
>
> **Q:** And that happened to you personally, right? You would personally be moved?
>
> **A:** It was normal, yes.

Pet. App. 15a-16a; *Watson v. Lithonia Lighting*, No. IP00-1744-C-M/S, 2002 U.S. Dist. LEXIS 4361, at *16-17 (S.D. Ind. Jan. 14, 2002).

The only evidence that Watson provided in her effort to avert summary judgment was a conclusory and obtuse affidavit that contradicted her earlier testimony, which in turn affirmed that rotation is Lithonia's norm and serves a business purpose. Those admissions are memorialized in excerpts of her August 2001 deposition testimony, which were offered to the trial court. Pet. App. 15a-16a; *see supra*, at 1-2. A party cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting her own previously sworn statement, without explaining the contradiction or attempting to resolve the disparity. *Cleveland*, 526 U.S. at 806-07. Moreover, in addition to being conclusory, obtuse, and contradictory to her prior sworn testimony, the affidavit was defective in that Watson did not affirmatively show that she is competent to testify to the matters stated therein, as astutely noted by the court of appeals. Pet. App. 3a; *Watson v.*

Lithonia Lighting, 304 F.3d 749, 751-52 (7th Cir. 2002) (citing Fed. R. Civ. P. 56(e)).

Accordingly, after recognizing that Lithonia's evidence was uncontested, the Seventh Circuit found that Watson had shown herself unable to avail herself of the rights and remedies embodied in the ADA. Pet. App. 3a; *Watson*, 304 F.3d at 752. Additionally, the court of appeals noted the soundness of the district court's ruling given the doubtful proposition that Watson is "disabled" as defined by the ADA,[1] *see Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002), and that what Watson was asking of Lithonia, essentially, to create a new position tailored to her abilities, is not a "reasonable" accommodation. *See, e.g.*, *Mays v. Principi*, 301 F.3d 866 (7th Cir. 2002); *Hansen v. Henderson*, 233 F.3d 521, 523-24 (7th Cir. 2000)

B. The decision below is not in conflict with the decisions of other circuits or the EEOC regulations.

Watson contends that the decision below is in conflict with the decisions of other circuits – specifically, those of the Third, Sixth, Eighth, and Ninth Circuits – and the EEOC regulations. This, however, is not accurate.

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[1] Neither the district court nor the court of appeals reached the issue of whether Watson's physiological deficiencies constitute a disability under the ADA because the case was so easily decided on other grounds. Pet. App. 2a, 12a; *Watson*, 304 F.3d at 750; *Watson v. Lithonia Lighting*, No. IP00-1744-C-M/S, 2002 U.S. Dist. LEXIS 4361, at *10 (S.D. Ind. Jan. 14, 2002).

As explained more fully in the previous section, the court of appeals based its holding on the Petitioner's admissions and her complete failure to adduce evidence sufficient to survive summary judgment, not some *per se* rule as Petitioner contends. Pet. 15. For that reason, the decisions to which the Petitioner directs this Court's attention as justification for *certiorari* are easily distinguishable.

The first case to which Petitioner directs the Court's attention is *Morton v. United Parcel Serv., Inc.*, 272 F.3d 1249 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 1910 (2002). *Morton* is a case centered around whether a plaintiff could perform discrete functions of a single position. In *Morton*, the plaintiff offered evidence to refute that the ability to drive Department of Transportation-licensed ("DOT") vehicles was an essential function of a package car driver position. Specifically, she provided evidence that swing drivers performed their duties using non-DOT vehicles and/or performed non-driving warehouse work when there was insufficient driving work. Here, Petitioner fails to adduce evidence that rotation is not an essential function of the MO position. To the contrary, Petitioner testified she was regularly required to perform a wide array of duties and that it was a "normal" part of her MO position to be rotated among the various lines and stations. *See supra*, at 1-3.

Next, Petitioner cites *Kiphart v. Saturn Corp.*, 251 F.3d 573 (6th Cir. 2001), which involved a question of whether being fully functional/fully rotational was an essential job function of working at the employer's plant. In *Kiphart*, the court determined that there was a question of material fact regarding whether being fully rotational was an essential function of the job where

essentially no one was required to rotate, much less the plaintiff. To the contrary, here, Petitioner affirmed she was required to rotate and provided no other evidence to dispute that rotation, indeed, was an essential function of the MO position.

The Petitioner also cites *Skerski v. Time Warner Cable Co.*, 257 F.3d 273, 282 (3d Cir. 2001), as conflicting authority. In *Skerski*, the plaintiff adduced evidence that he did not climb poles, a function which the employer alleged was essential to his position as an installer technician, for a continuous period of over three years, in addition to the fact that his assignments were distributed at a supervisor's discretion. Based on the requirements of her employer's business, for any day in question, Petitioner admits employees, including herself, would regularly rotate to various lines and stations and that her repetitive activity restrictions ebbed and flowed. Unlike Skerski, who went over three years without performing a function his employer alleged to be essential, Petitioner was only intermittently restricted from rotating, an essential function of the MO position. Moreover, a supervisory change in *Skerski* seemed to prompt plaintiff's discharge. Here, it was the nature and quality of Petitioner's previous work restrictions that compelled Lithonia to release Petitioner, as she was no longer permitted to perform any repetitive functions, thereby precluding rotation.

Finally, Petitioner cites *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108 (8th Cir. 1995). The *Benson* court noted, "Inquiry into whether a particular function is essential initially focuses on whether the employer actually requires employees in the position to perform the functions that the employer asserts are essential." *Id.* at 1113 (quoting Americans with Disabilities: Practice and Compliance

Manual § 7:42 (George L. Bounds et al. eds., 1995)). Moreover, the *Benson* court acknowledged that essential job functions "should reflect the actual functioning and circumstances of the particular enterprise involved." *Id.* at 1114 (quoting *Hall v. United States Postal Serv.*, 857 F.2d 1073, 1079 (6th Cir. 1988)). Here, Petitioner admitted that rotation was required by her employer and that she had actually been required to rotate, thereby making rotation an essential function for the MO position under the tests set forth in *Benson*. This stands in stark contrast to *Benson*, where the essential functions of the position at issue were unknown to the court.

Furthermore, the decision below does not conflict with the EEOC regulations. Petitioner argues, "the court of appeals neither mentioned nor applied the EEOC regulations." Pet. 24. Admittedly, the EEOC regulations can be helpful in guiding a court's analysis of the "essential functions" issue when the parties properly place that issue in dispute. *See* 29 C.F.R. § 1630.2(n) (delineating factors to be considered when conducting an essential functions analysis). In the case below, however, Watson unequivocally admitted that rotation among positions was an essential function of the position Watson held. Consequently, there was no need for the court of appeals to apply the EEOC regulations to reach its decision.[2]

[2] Respondents direct this Court's attention to *Basith v. Cook County*, 241 F.3d 919, 927 (7th Cir. 2001) and *Emerson v. N. States Power Co.*, 256 F.3d 506, 512 (7th Cir. 2001), which demonstrate that the Seventh Circuit is not a stranger to applying the EEOC regulations when the evidence before it requires a full blown analysis of essential functions. There is no indication in the *Watson* decision that the

(Continued on following page)

In the absence of any conflict between the decision of the court of appeals in this case and the decisions of other courts of appeals or the EEOC regulations, Respondent respectfully submits that this case does not fall within the purview of Supreme Court Rule 10. Therefore, a grant of *certiorari* would be inappropriate.

C. Petitioner overstates the implications of the decision below.

Petitioner exaggerates the scope of the Seventh Circuit's decision. Petitioner incredulously contends that the decision of the court of appeals, "if allowed to stand, will create a loophole so large that almost any employer . . . will be able to insulate itself from the requirements of the ADA." Pet. 3. Petitioner overstates the implications of the Seventh Circuit's holding. The decision below is extremely limited in that it is based on Petitioner's concession of her inability to show herself qualified, and would be readily distinguishable from subsequent cases where such an admission is not made.

Petitioner's characterization of the *Watson* holding as the Seventh Circuit yielding its adjudicatory functions to the whims of an employer under the guise of an "essential functions" analysis misses the mark. The decision below is not meant to be the Seventh Circuit's sole pronouncement on "essential functions" analysis. *Supra*, at n.2. Rather, the decision below simply recognizes Petitioner's failure to meet her burden of production.

Seventh Circuit intended to abandon the type of essential functions analysis employed in *Basith* and *Emerson*.

II. CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that the Petition for *Certiorari* be denied.

Respectfully submitted,

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(3)

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IN THE

Supreme Court of the United States

TAMARA WATSON,

Petitioner,

v.

LITHONIA LIGHTING, D/B/A HI-TEK GROUP, A WHOLLY OWNED SUBSIDIARY OF NATIONAL SERVICE INDUSTRIES, INC., AND NATIONAL SERVICE INDUSTRIES, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Petitioner Tamara Watson respectfully submits this reply in further support of her petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

ARGUMENT

The question whether an employer may insulate itself from the obligations of the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. § 12101 *et seq.*, by asserting that it requires all employees to be capable of "rotating" through all positions within a facility is starkly presented in this case. Plaintiff presented evidence that, despite her disability, she was capable of working on certain of the assembly lines within defendant's facility. *See* Pet. App. 15a; *id.* at 23a. The record contained no evidence to the contrary. Defendant instead relied upon an affidavit from its own human resources manager asserting that employees in the position held by plaintiff, a Manufacturing Operator ("MO"), could be moved from line to line, *id.* at 27a, and upon a "job description" – created subsequent to plaintiff's initial injury – stating that "employees may be switched at any given time from line to line" and "must be able to perform the maximum requirements of each particular line," *id.* at 30a. Despite deposition testimony and an affidavit from plaintiff indicating that this type of "line-to-line" rotation actually was a sporadic and *ad hoc* occurrence at the facility, the court below concluded "as a matter of law" that such rotation was an "essential function" of the MO position. On that basis alone, the court affirmed summary judgment. Accordingly, this case presents a simple and straightforward set of facts upon which this Court can consider the appropriate standard for determining what functions of a position are "essential," and how that issue is to be addressed in the context of a summary judgment motion.

Defendant, in opposition to the petition, asserts that plaintiff "admitted" that she could not perform the "essential functions" of the MO position, and thus that the decision of the court of appeals was nothing more than an uncontroversial application of summary judgment standards. Opp. at 1-3. And defendant argues that the decision below does not conflict with decisions of other courts because those other courts were not faced with similar "admissions" of the plaintiff's inability to perform "essential functions." Opp. at 5-7. Thus, in essence, defendant argues that because of this supposed "admission" by plaintiff, this case does not squarely present any legal issues because plaintiff necessarily would lose no matter what legal standard was applied.

The assertion that plaintiff "admitted" that she could not perform the "essential functions" of the MO position, however, is a mischaracterization of the factual record that was before the court below. By relying almost exclusively upon this easily-rebutted assertion, defendant further demonstrates precisely why the decision of the court below was incorrect and why that decision conflicts with decisions of other courts and the applicable regulations of the Equal Employment Opportunity Commission ("EEOC"), 29 C.F.R. § 1630.2(n).

Defendant argues that plaintiff made her supposedly fatal "admission" in her deposition testimony. Opp. at 1-3. But that testimony contains no such admission. In her testimony, plaintiff did admit that, within a particular assembly line, she would rotate from station to station "three to four times a day." Opp. at 2 (quoting Pet. App. 15a). But that type of station-to-station rotation was *not* the type of "rotation" that was at issue, because the record contained clear evidence that, *even with such station-to-station rotation*, there were certain assembly lines on which plaintiff

could work even with her disability. Pet. App. 15a; *see also id.* at 23a.

The "rotation" at issue in the decision below was not station-to-station rotation, but rather was line-to-line rotation. And plaintiff clearly did *not* "admit" that line-to-line rotation was a "norm" at the facility, let alone that such line-to-line rotation was an "essential function" of the MO position. When asked at her deposition about her experience with line-to-line rotation, plaintiff testified: "[y]ou might be moved [from line to line] a couple time a week. Sometimes you might not be moved at all." Opp. at 3 (quoting Pet. App. 16a). And in an affidavit submitted in opposition to the summary judgment motion, she stated that, upon being hired, she had been "permanently assigned" to a single line, with only "occasional" transfers to other lines to meet "production needs."[1] Pet. App. 22a. In sum, her deposition testimony and affidavit constituted evidence that line-to-line rotation

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[1] Defendant argues that "the affidavit was defective in that Watson did not affirmatively show that she is competent to testify to the matters stated therein, as astutely noted by the court of appeals." Opp. at 3. But the court of appeals "noted" no such thing. Rather, the court of appeals – like defendant in its Opposition – manufactured an "admission" by plaintiff that "rotation is Lithonia's norm and serves a business purpose." Pet. App. 3a. Because of that supposed "admission," the court of appeals simply ignored the portion of plaintiff's affidavit in which she *disputed* that "rotation" was a "norm." The court of appeals, however, did address a different portion of the affidavit, in which plaintiff stated that two other employees were "on non-repetitive motion restrictions similar to [her] own." Pet. App. 23a. With respect to that part of the affidavit, the court of appeals did *not* address Petitioner's "competence," but rather held (incorrectly) that it was not based upon "personal knowledge," *id.* at 3a, even though plaintiff had personally worked at the facility for almost two years, and thus had an obvious basis for personal knowledge concerning work assignments of other employees.

was neither the "norm" nor a regular occurrence at the facility, but rather was at most sporadic and *ad hoc*.[2]

Under the EEOC regulations, and decisions of courts that have applied a multi-factor analysis similar to those regulations, plaintiff's deposition testimony and affidavit would have been more than sufficient to demonstrate a "genuine issue" of "material fact" within the meaning of Fed. R. Civ. P. 56(c). This evidence would have been relevant to a number of the factors listed in 29 C.F.R. § 1630.2(n), including the "amount of time spent on the job performing the function," the "consequences of not requiring the incumbent to perform the function," and the "work experience" of "past" and "current" incumbents in the position. In short, plaintiff's own experience in the position – that she was permanently assigned to a single line, and that she was asked to work on other lines only sporadically – was evidence that line-to-line rotation was not "essential" to the MO position, but rather was at most only a "marginal" aspect of that position. *See* 29 C.F.R. § 1630.2(n)(1) (distinguishing between "essential" and "marginal" functions); *see also Skerski v. Time Warner Cable Co.*, 257 F.3d 273, 283 (3d Cir. 2001) ("Skerski's ability to perform as an installer technician for more than three years without climbing might lead a reasonable juror to infer that Skerski's inability to climb had no adverse consequences for his employer, a factor that is relevant to determining what is an essential function."); *Kiphart v. Saturn Corp.*, 251 F.3d 573, 585 (6th Cir. 2001) (despite evidence that the "job rotation concept" played an "essential role" in Saturn's "operational

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[2] Defendant contends that plaintiff's affidavit "contradicted" her deposition testimony, and should be ignored for that reason. Opp. at 3. But neither the district court nor the court of appeals relied upon any such "contradiction." And, in fact, on the issue of line-to-line rotation, her deposition testimony and affidavit were entirely consistent with each other.

vision," reversing judgment as a matter of law where "the actual consequences of not requiring employees to rotate fully appear far less severe than Saturn suggests").

Thus, the claim that the decision below does not conflict with decisions of other courts or with the EEOC regulations hinges upon a mischaracterization of the factual record in this case. Because plaintiff *did* present evidence that line-to-line rotation was *not* an essential function of the MO position, the decision below quite clearly does conflict with decisions of other circuit courts, *see* Pet. at 15-23, and with 29 C.F.R. § 1630.2(n), *id.* at 23-25.

Finally, defendant contends that plaintiff has "overstate[d]" or "exaggerate[d]" the implications of the decision below. Opp. at 8. But, again, that contention is based upon an asserted "concession" by plaintiff of "her inability to show herself qualified[.]" *Id.* As demonstrated above, plaintiff never made any such concession. When that mischaracterization of the record is put to one side, then the implications of the decision below are indeed startling. The employer in this case prevailed "as a matter of law" on the issue of "essential functions" even though the employer's only evidence consisted of after-the-fact assertions, and even though those assertions were directly disputed by plaintiff's deposition testimony and affidavit. The court of appeals upheld summary judgment by blindly accepting the employer's own self-serving assertions, ignoring plaintiff's contrary evidence, and speculating on the theoretical (but factually unsupported) "benefits" of a rotation system that had not been proven to exist (let alone proven to exist "as a matter of law").

Under the decision of the court of appeals, an employer need only *claim* that it has a "rotation" system that requires all employees to be able to perform all tasks of all jobs within a facility, and that employer is insulated from ADA

liability. It is neither exaggeration nor overstatement to say that this decision, if allowed to stand, will vitiate the protections of the ADA within any large-scale manufacturing facility, at least within the Seventh Circuit and other jurisdictions that follow the decision below. In those parts of the country, "rotation" will become synonymous with "disability free." This Court should grant the petition to consider this important issue, and to resolve the existing confusion surrounding the appropriate standards for determination of a position's "essential functions."

CONCLUSION

For the reasons stated herein, and in the petition for a writ of certiorari itself, the petition should be granted.

Respectfully submitted.

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